STATE OF MICHIGAN

COURT OF APPEALS

STEVEN J. GREENWALD, Plaintiff-Appellee,	UNPUBLISHED August 9, 2007
v	No. 265814 Oakland Circuit Court
LEE J. GREENWALD, Defendant-Appellant.	LC No. 2004-057293-CZ

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

Kelly, J. (*dissenting).*

I respectfully dissent. I would reverse and remand for entry of an order granting summary disposition in defendant's favor.

I. Tortious Interference

Defendant contends on appeal that the trial court erred in granting summary disposition in plaintiff's favor, and should have granted summary disposition in her favor. I agree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

In *PT Today, Inc v Comm'r of Office of Financial & Ins Services*, 270 Mich App 110, 148; 715 NW2d 398 (2006), this Court set forth the elements of a tortious interference with a business relationship or expectancy claim:

> (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted.

Winiemko v Valenti, 203 Mich App 411, 416; 513 NW2d 181 (1994) also describes these elements:

> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another. [Internal quotation marks and citations omitted.]

A. Proximate Cause

First and foremost, I believe the majority has erred in failing to properly analyze whether defendant's contacting and providing information to UBS was the proximate cause of UBS firing plaintiff and terminating settlement negotiations with him.

To establish proximate cause, a plaintiff must prove two distinct elements: (1) cause in fact, and (2) legal cause, also termed "proximate cause." *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). The element of cause in fact generally requires proof that "but for" the defendant's conduct, the plaintiff would not have been injured. *Id.* at 163. A plaintiff must first demonstrate cause in fact before legal cause or "proximate cause" becomes relevant. *Id*. "Legal, or proximate, cause is 'that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred.'" *Lamp v Reynolds,* 249 Mich App 591, 600; 645 NW2d 311 (2002), quoting *Helmus v Dep't of Transportation,* 238 Mich App 250, 256; 604 NW2d 793 (1999). "Generally, proximate cause is a factual issue to be decided by the trier of fact." *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). "However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law." *Id*.

In this case, the evidence demonstrates that there is no genuine issue of material fact regarding the proximate cause of UBS firing plaintiff and abandoning settlement negotiations with him. James Pierce, a manager with UBS, attested that:

> 2. Upon information and belief, Lee Greenwald contacted UBS on or about May 8, 2003 with information and allegations of wrongdoing of Steven Greenwald pertaining to his expense reimbursements, among other things.
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> 3. Based upon information provided by Lee Greenwald, UBS initiated an investigation of Steven Greenwald's expense account reimbursements, among other things.
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> 4. *Based on its investigation, Steven Greenwald's employment with UBS was terminated effective October 8, 2003, for submitting to UBS numerous false expense vouchers for reimbursement as business expenses and settlement discussions with Steven Greenwald were discontinued.* [Emphasis added.]

In a letter to plaintiff's attorney, counsel for UBS stated that plaintiff was

> *terminated for submitting numerous false expense vouchers for reimbursement as business expenses* . . . UBS employees are expected to submit expense vouchers only for valid business expenses and to fully cooperate fully and truthfully in all investigations. Based upon UBS's investigation of allegations independently raised by a third party about expense reports submitted by Mr. Greenwald, UBS has concluded that Mr. Greenwald submitted false expense reports in violation of company policy. *UBS also concluded that Mr. Greenwald was not truthful . . . in connection with the Firm's investigation of these allegations.*
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> . . . a number of witnesses listed on Mr. Greenwald's expense reports expressly denied meeting with Mr. Greenwald for drinks or meals at the places he listed and/or denied meeting with him for the purposes indicated on the expense reports. Others specifically refuted Mr. Greenwald's claims that they brought their wives to business meeting with Mr. Greenwald. Still others interviewed confirmed that Mr. Greenwald falsely submitted household expense (such as meals and birthday cakes for his family) as business expenses. [Emphasis added.]

At most, the Pierce affidavit and the letter from UBS's attorney establish that defendant's conduct only caused an investigation to be initiated. The actual cause of the plaintiff's termination was the falsity of numerous expense vouchers submitted by plaintiff during his employment and his lack of candor during the investigation.

Further, plaintiff himself admitted that he submitted false expense vouchers, though he characterized it as "unintentional." He admitted that this happened more than one time, though he could not say how often. Plaintiff also testified:

> I didn't say that all the information provided by my ex-wife was untrue. I said some of it was, some of it wasn't. The firm only needed one receipt that was unintentionally turned in to give me cause to be terminated.

On the basis of this evidence, there was no genuine issue of fact that plaintiff's own actions were the but-for cause of his being terminated. Pierce attested that UBS conducted an investigation "based upon information provided by [defendant]," but terminated plaintiff's employment because of his submission of false expense vouchers. Accordingly, while defendant's contact with UBS set the investigation in motion, plaintiff's own submission of false expense vouchers was the but-for cause of his being terminated. If UBS's investigation had not uncovered that plaintiff submitted false expense vouchers, then UBS would not have terminated him, regardless what defendant said.

Even if defendant's contacting UBS could be considered the but-for cause of plaintiff being fired, it could not be the proximate cause. In *Helmus*, *supra* at 256, this Court explained:

> Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the

> injuries would not have occurred. To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. While the issue of proximate cause is usually a factual question to be decided by the jury, the trial court may dismiss a claim for lack of proximate cause when there is no issue of material fact. [Citations omitted.]

In this case, there is no genuine issue of material fact as to why UBS fired plaintiff. Plaintiff himself admitted that he "unintentionally" submitted false expense vouchers and this was enough for UBS to fire him.[1] Plaintiff also submitted documentary evidence that UBS fired him for submitting false expense vouchers and for failing to be truthful during the investigation. Basically, he got caught with his hand in the proverbial cookie jar. Plaintiff's own actions were the proximate cause of his misfortune.

This conclusion is also supported by the "wrongful-conduct rule" in *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995), which provides, in pertinent part, that a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on his own illegal or immoral act. In *Orzel*, our Supreme Court noted that the rationale for this rule is rooted in the public policy "that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Id.* at 559. In this case, plaintiff admitted that he submitted false expense vouchers and that this submission was sufficient to warrant his being fired. It was this wrongful act that caused plaintiff's injury. Applying the public policy behind the wrongful-conduct-rule to this case, this Court should not lend its aid to plaintiff where he caused his own termination and loss of settlement proceeds by his own conduct.

Moreover, under the circumstances of this case, the connection between defendant's conduct and plaintiff's alleged injury was not such that it is "socially and economically desirable" to hold defendant liable. *Helmus, supra* at 256. It is unfathomable that defendant can be held liable because plaintiff was caught submitting false expense vouchers to his employer and getting reimbursed for them. To do so leads to a result that turns the justice system on its head. Plaintiff, who was terminated for conduct he admits he engaged in and admits legitimately caused his termination, lost his settlement agreement with UBS. He then attempted to invoke the judicial process to recover this lost settlement from defendant simply because she reported plaintiff's conduct, which resulted in UBS initiating an investigation. I would conclude, based on the record evidence, that no reasonable jury could conclude that defendant's conduct was the proximate cause of plaintiff's injury.

The trial court should have granted summary disposition in defendant's favor because there was no genuine issue of material fact on the element of causation.

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[1] Although this is plaintiff's testimony, I find it incredible that, over several years' time, plaintiff could have continuously submitted false expense vouchers "unintentionally."

B. Improper Interference

Additionally, I would conclude that there is no genuine issue of material fact on the element of improper interference. Plaintiff asserts that defendant's improper interference stemmed from defendant's "intentional doing of a per se wrongful act," *Badiee v Brighton Area Schools*, 265 Mich App 343, 367; 695 NW2d 521 (2005), specifically that defendant violated a protective order. However, a careful reading of the protective order, the relevant court rule, and the evidence reveals that defendant did not violate the protective order.

The Michigan Court Rules provide:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, or oppression, or undue burden or expense, including one or more of the following orders . . . .
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> (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. [MCR 2.302(C)(8)]

Accordingly, pursuant to MCR 2.302(8), the trial court was permitted to enter an order for the protection of UBS's "confidential research, development, or commercial information." Plaintiff requested and obtained a protective order providing in relevant part:

> The information and documentation relating to Steven Greenwald's weekly, monthly and/or annual expense reports and house account reimbursements made during the years 1999, 2000, 2001 and 2002 which are produced or exchanged in the course of this litigation is designated as "CONFIDENTIAL" and shall be used only for the purpose of this litigation.

The purpose of this protective order was to prevent sensitive corporate information, particularly plaintiff's recruiting efforts on behalf of UBS, from being disclosed. Contrary to plaintiff's assertion, it was not to protect plaintiff's potentially criminal activity, see MCL 750.174. If this is what plaintiff intended, that purpose was clearly not disclosed to the judge presiding over the divorce action. It is inconceivable that any trial court judge would enter a protective order for the purpose of shielding a party from the disclosure and consequences of his own wrongful conduct.

Defendant's actions did absolutely nothing to jeopardize the confidentiality of UBS's "confidential research, development, or commercial information." Again, plaintiff himself submitted the false expense vouchers, which were already in UBS's possession. The other information defendant supplied to UBS was not "confidential research, development, or commercial information." Some of the information was simply derived from defendant's own personal experience. Other information was simply her and her sons' birthdates. Still other information consisted of lists of items taken from the branch office or purchased by UBS and in

plaintiff's possession, such as furniture, artwork, and wine. None of this information, regardless how plaintiff characterizes it, has anything to do with UBS's "confidential research, development, or commercial information." Moreover, the order was meant to protect UBS, and defendant disclosed information *to UBS*. And UBS was not harmed, but rather, benefited from the information defendant provided. For these reasons, I would conclude that there is no evidence that defendant violated the protective order. Aside from the contrary conclusion not being supported by the plain language of MCR 2.302(C), it defies any rational public policy to permit a party to use a court-issued protective order from one case as a shield in another case to hide the fact that he "unintentionally" stole from his employer.[2]

I would reverse and remand for entry of an order granting summary disposition in defendant's favor.

/s/ Kirsten Frank Kelly

[2] I would further note, though it is not essential to my analysis, that despite plaintiff's repeated assertions that defendant was "in contempt of court," there was no determination that she was. Even if she had violated the protective order, basic due process would entitle her to a legal determination whether she was actually in contempt of court.